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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

COMMERCIAL LOVELACE MOTOR FREIGHT, ET AL.,
Petitioners,

v.

WILLIAM T. USELTON, ET AL.,
Respondents.

PEPSICO, INC. LAWRENCE DICKIE,
JAMES ENGLISH, JUDY NORMAN-DAVIS,
RICHARD CAMPBELL, AND SHARON SCHRODER,
Petitioners,

v.

WILLIAM T. USELTON, ET. AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals Decision below conflicts with this Court's Decision in *International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helper of America v. Daniel*, 439 U.S. 551 (1979), in holding that an employee who has agreed to participate in a voluntary contributory defined contribution plan in the form of a wage reduction program which, among its components, includes a personal and individual wage reduction from the previously negotiated union rate in exchange for an interest in an employee stock ownership plan, has purchased an investment contract and, therefore, a security under 15 U.S.C. §§ 77b(1) and 78c(a)(10)(1988).

2. Whether the Court of Appeals Decision below conflicts with this Court's Decision in *Daniel* in holding that an em-

ployee benefit plan subject to regulation under the Employee Retirement Income Security Act, 29 U.S.C. ¶¶ 1001-1461 (1988), also is subject to regulation under Federal Securities Laws.

PARTIES TO THE PROCEEDINGS

Respondents are 485 former employees of Lee Way Motor Freight, Inc. as follows:

ABLE, CARROLL; ABREGO, PROTACIO; ADAM, JAVIER; ADAMS, DOYLE; AEBISCHER, WILLIAM; ALLEN, RICKY D.; ALLISON, HAROLD; ALTIZEN, JAMES; ANDERSON, WILLIAM; ANDERSON, ALONZO; ANDERSON, ROBERT; ANDERSON, BILL J.; AYRES, JAMES; AZLIN, WILLIAM; BABST, ARNOLD; BAILEY, D. E.; BALDWIN, GERALD; BALLARD, JOHNNY; BARCENA, ESEQUIEL; BARNES, RICKKI; BARNETT, A. W.; BARRERA, JESSE; BARRERA, MANUEL R.; BARRETT, LEROY; BARTON, GEORGE; BASS, BILL; BASS, JERRY; BAUTISTA, MARTIN; BAXTER, HENRY; BEERY, WILLIAM; BENDER, JERRY; BENNETT, BOBBY; BENNETT, SHIRLEY; BENSON, BILLY; BIDDLECOME, FLOYD; BILLINGS, K.L.; BISHOP, J. R.; BISHOP, ELDON; BIVINS, R. D.; BLACK, JAMES; BLADES, C. R.; BLANKENSHIP, J. L.; BOMHOFF, NANCY; BOOKER, VALERIE; BOREN,

RICHARD; BOUCHELLE, BRYON; BOWLING, BOBBY; BOYD, I. B.; BRANNONG, J.; BRICKER, WILLIAM; BRIDENSTINE, RONALD; BRIECHISEN, DONALD; BROCK, KEITH; BROCK, PATSY; BROUSSARD, O.L.; BRYANT, VAUGHN; BURKETT, ANNA; BURKHALTER, J.D.; BURNS, CLARENCE; BURRELL, B. J.; BURTON, DUDLEY; BUSSING, FERRELL; BUTLER, DONALD L.; BYNUM, JACK; CANNON, MAURICE; CARDWELL, NORMAN; CARNEY, DAVID; CARPENTER; MELVIN; CARROLL, NELDA; CARROLL, EVERT; CARSON, TROY; CASEY, JERRY; CAUDILL, RONALD; CHANEY, ALVA; CHAPIN, WARREN REX; CHAPMAN, LESLEY; CHRISTENSEN, CARL; CHRISTIANS, GLEN; CHRONISTER, JERRY; COMBS, LEON; CONTRERAS, ROBERT; COPELAND, E. B.; COTA, RUBEN; COULTER, E. H.; COURTNEY, LLOYD; COX, BETTY; CRAWFORD, REBECCA; CREWS, THEAL; CREWS, DENNIS; CUTLER, DON E.; DAGUE, HAROLD; DALLA ROSE, PAULA; DANLEY, WILLIAM; DAVENPORT, JOHN; DAVEY, RAYMOND; DAVIDSON, CARL; DAVIDSON, CARL; DAVIS, DAISY; DAVIS, L. V.; DAVIS, CARL F.; DAVIS, CARL; DECKER, BOBBY; DEDMON, EMORY; DEERING, BOBBY; DENNY, DANIEL; DENTON, EARL; DODD, WILLIAM; DOERN, CARMEL; DOWLING, J. C.; DUNCAN, LLOYD; EDGEMON, JERRY L.; EDWARDS, JACK; EDWARDS, JOHN WILLIAM; ELIAS, ADOLFO; EVANS, B. C.; FERGUSON, ROBERT; FERGUSON, ROBERT M.; FIDLER, E. J.; FITZ, DONALD; FITZGERALD, ALVIN; FORBES, JERRY;

FOREMAN, L. V.; FORTUNE, LLOYD; FREDEIU, HUEY A; FREEMAN, JAMES L.; FRESONKE, LEW; FRIZZELL, T. D.; FROST, CLEOPHUS; GALINDO, ROLANDO; GAMEZ, MANUEL; GARRISON, IONA; GLEN LAYTON; GLOVER, MARLAND; GOAD, GERALD; GOLDEN, JUNIOR LEE; GOLDEN, ARTHUR; GOMEZ, STANLEY; GONZALES, L. W.; GONZALES, TONY; GOODMAN, PAUL; GOYA, LORITA; GRAY, LEROY; GRAY, JOE; GREEN, ALVIN; GREENE, EARL; GRIFFIN, EARL V.; GUNN, W. R. HAHN, JOHNNY; HANCOCK, LEON; HANSHUE, D. K.; HARLSON, D. L.; HARNED, J. W.; HARRIS, SHARON KAY; HARRIS, J. W.; HARWELL, BARBARA; HAWKINS, BILLY O.; HAYS, KENNETH; HEIL, J. H.; HENDERSON, JOEL; HENRY, RITA; HENSON, JOHNNIE; HERNANDEZ, FRANK M.; HERNANDEZ, GILBERT; HESS, HARVEY; HILL, LEROY; HILL, HARRY; HILL, NIB E.; HINES, DAVID; HOFFMAN, MOLLY; HOHENSEE, W. H.; HOLMAN, CARL; HOLQUIN, MANUEL; HOOPER, GARLAND; HORN, JOHN D.; HORN, RAYMOND; HOSKINSON, HENRY; HOUSTON, LEE ROY; HOWARD, TOMMY; HOWELLS, RICHARD; HUCKABY, CHARLES; HUNT, JOHNY S.; HUPP, D. W.; JACK, TOMMIE; JACKSON, KENNETH; JACKSON, EARL; JARAMILLO, LISARDO; JARANILLE, THOMAS; JARMILLO, THOMAS; JEFFCOAT, G.D.; JENKINS, BILLY; JENNINGS, JIMMIE; JOHNSON, JERRY; JOHNSON, BOBBY; JOHNSON, JAMES T.; JOHNSON, JOHNNY L.; JOHNSTON, RANDALL; JONES, T. L.; JONES, JACKIE; JONES, BILLY R.; JONES,

CHARLIE M. JR.; JORDAN, VERNON; JOSEPH, WILLIE; JOSLIN, EARL; JOSLIN, EARL; JUAREZ, VICTOR; JUDY ROGERS KEESEE, WILLIS; KEITH, JIM BOB; KEITH, HERBERT; KEITH, BRITT INGRID; KENDRIX, DONALD; KENDRIX, DONALD; KENNEDY, JERRY; KENNICUTT, BOB; KIMBLE, HOMER; KING, ALYCE; KING, JIMMY; KING, EDWARD; KIRKLAND, TOMMY; KLAUS, HERMAN; KNAPP, JOE; KNAPP, JOHN L.; LABAW, (Labain), JOHN; LAMB, SHIRLEY; LANCASTER, NORVELL; LARSON, DONALD; LASENBERRY, LAWRENCE LAVELLE, EDWARD; LAVENDER, CARL; LAVIN, GLEN SR.; LEE, JAMES E.; LENT, JOHN D.; LEPLEY, DON; LEWIS, WALTER; LEWKASKI, LINDA; LOMAN, D. L.; LONG, JAMES; LONG, MARCIA; LOONEY, DANIEL; LOUDERMILK, WILLIE; LUTON, GERALD; MANUEL JOE; MARKS, JR. FULTON; MARQUEZ, ARTURO; MARSHALL, BEN; MARTIN, JO ANN; MARTINEZ, ALFRED; MASON, JAMES; MASTERS, JIMMY; MAULDIN, HOLLIS; MAXWELL, JO F.; MC DONALD, T. J.; MC CORMICK, LEEHA; MC DANIEL, CLEO; MCCAMPBELL, JAMES; MCCANLIS, PATRICIA; MCCLELLAND, MARION; MCINTYRE, WILLIAM; MCKYE, FRANCIS; MEEK, MARVIN; MENDOZA, HECTOR; MERKLE, DANIEL; MESSELL, DOUG; MILES, KENNETH; MITCHELL, HAROLD; MITCHELL, HOWARD; MONROE, RUEL; MOORE, BETTY; MOORE, STANLEY; MORGAN, DEATRON; MOWERY, ELENOR; MOYLAND, STEVEN; MOYSHEN, JOHN; MULENBRUCH, WAYNE; MUNOZ, OSCAR; MURDOCK, RONALD; MURDOCK, RONALD;

NEAL, JAMES; NEELY, FRANKLIN; NELSON, THURMAN; NEVELS, W. H.; NIBLOCK, DALLAS; NIXON, JOE; NIXON, JOE; NOHNAGER, JERRY; NORTON, CHARLES; NYDICK, KAREN; OLIVER, JIM; OLSON, C.G.; OYOS, ALBERT; PARTIN, WILLIAM; PASSON, GARY; PEARSON, REBECCA; PEMBERTON, CHARLES; PEREZ, SALVADOR; PEREZ, J. M.; PERKINS, DORA; PETERSON, ROGER; PFUNDSTEIN, MICHAEL; PHELPS, LEROY; PHILLIP HORN; PHILLIPS, F. C.; PICKENS, FARRELL; POINDEXTER, TERRY; PORTER, (Poerwe E. Jmwa) JAMES; PORTER, ROBERT G.; POWELL, OSCAR G.; PRICE, BOBBY; PRUDHOME, ALAN; QUALLINE, D.Y.RACKLEY, J. W.; RAMONDO, BERRY; REAZA, NARCIZO; REDDELL, WILBURN; REEVES, HORACE; REEVES, BILL; REYNOLDS, CLINTON; REYNOLDS, JOHN; RICHARDSON, ARNETT; RIDER, EUGENE; RIDGLEY, C. D.; ROBBINS, TOMMIE; ROBINSON, JOEL; ROBLES, GILBERT; RODRIGUEZ, GUADALUPE; RODRIQUEZ, RAMON; RODRIQUEZ, JIMMIE; RODRIQUEZ, JIMMIE; ROGERS, DWIGHT; ROGERS, JUDY; ROGNON, BOB; ROGNON, ROBERT; ROHLING, R. H.; ROWE, JAMES; ROWLAND, JACK; RUMINER, KELLEY; RUSHING, JAMES; SAENZ, BENJAMIN; SAENZ, BERNARDO; SAENZ, BEN; SALINAS, WILLIAM; SANCHEZ, RICHARD; SANDELL, WILLIAM; SASSANO, ROY; SCHRODER, JAMES (Jmwa Axheowswe) SCRUGGS, LEO; SENA, MANUEL; SHARBER, BOB; SHEA, HAROLD; SHEEN, CESAR; SHELTON, LAWRENCE; SHOCKLEY, WILLIAM;

SIKORSKY, DANIEL; SILVER, FRED; SKELTON, R. T. SKINNER, RICK; SMITH, BOBBY D.; SMITH, J. DAVID; SMITH, ROGER; SMITH, BRUCE O.; SMITH, W. A.; SMITH, CLARENCE E. SOLIDAY, CARL; SPITZLEY, ANTHONY; STAFFORD, LARRY JOE; STANLEY, JOHN O.; STANSBURY, BOBBY E.; STERRETT, K. E.; STEWARD, RONNIE; STEWART, BILL; STOCKTON, C. E.; STUART, ROBERT E.; SUDDUTH, GERALD SUGGS, LEO; SUMMERLIN, ANDY; SUMMERS, HAROLD; TERRAZAS, JESSE; TERRY, WILLARD; THOMAS, DENNIS; THOMAS, LEALUS; THOMAS, FRANK; THOMPSON, JAMES; THOMPSON, LEO; THRELKELD, THOMAS; TRAUB, WILLIAM TRIGG, DIANNE; TSOODLE, GEORGE; TURNER, ROBERT; TWEEDY, ALTON; UHRMACHER, MAURICE; USELTON, WILLIAM T.; UTLSER, DELBERT; VAP, J.; VAP, EDITH; VERDE, VAL, CEASAR; WAGNER, GERALD; WALCHER, LESLIE; WALKER, HARRY MAX; WALLACE, JOHNNY; WALLING, FRED; WARD, JAMES; WARD, OTIS; WARMOTH, JOHNNY; WARREN, PAUL; WARREN, JERRY A.; WARREN, PAUL M.; WASHINGTON, JOHN; WEAVER, CLAUDIE C.; WEBB, DOUGLAS; WELCH, HOWARD L.; WELLS, WAYNE T.; WESLEY, ROBERT A. WESTON, JAMES; WHEELER, DON; WHITE, LAWRENCE; WHITE, EARL E. WHITTENBERG, HOWARD; WILKERSON, BOB L.; WILLCOCK, E. L.; WILLIAMS, KENNETH; WILLIAMS, RUBEN; WILLIAMS, JIMMIE; WILLIAMSON, HUBERT; WILSON, ROBERT; WILSON, JACK D.; WILSON, CARL LEE; WIMMER, WILLIAM T.;

WING, HOWARD; WINTER, DONALD; WITT, K. D.; WIXOM, WILLIE; WOFFORD, EARL; WOLF, MARY ANN; WOLFE, JACK E.; WOLFE, PETE; WOLFE, RAMON; WOLPOFF, VINCE; WOMACK, C. J.; WOODWARD, JAMES; WORKLEY, CLAUDE; WORKMAN, LENORA; WRIGHT, MARVIN; WRIGHT, THERESA; WRIGHT, PATRICK; YANDELL, DEBORAH; YARBROUGH, JACK; YOCUM, FINIS; YODER, WARREN, YOUNG, WELCOME; YOUNG, JAMES

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STATEMENT OF THE CASE

Respondents are 485 former employees of Lee Way Motor Freight. Inc. ("Lee Way"), a trucking concern, formerly headquartered in Oklahoma City, Oklahoma. Lee Way was acquired by PepsiCo, Inc. in 1976. In June 1984, PepsiCo agreed to sell Lee Way to Commercial Lovelace Motor Freight, Inc. ("CL"). The sale required the approval of the Interstate Commerce Commission ("ICC"). When the ICC approved the transaction in August, 1984, the sale was finalized. While PepsiCo and CL waited for ICC approval, CL operated Lee Way pursuant to a management agreement.

In 1983, approximately one year before CL acquired Lee Way, CL implemented a wage reduction program at CL in order to reduce CL's costs, partly in response to competitive pressures created by deregulation of the trucking industry. In June, 1984,

after PepsiCo agreed to sell Lee Way to CL, and while waiting for ICC approval, CL's management began soliciting Lee Way employees to participate in the compensation program already in place at CL. The terms offered to Lee Way employees were the same terms implemented by CL in 1983. Non-union salaried employees of Lee Way were required to participate in the compensation program as a condition of their employment. Union employees signed individual consent forms in order to participate.

The CL wage reduction program consisted of three parts: (1) an employee wage reduction of 17.355%; (2) a cash profit-sharing bonus plan entitling employees to 20% of consolidated pre-tax profits earned by CL;and (3) an employee stock ownership plan in CL common stock (the "ESOP").

The following facts regarding the ESOP were stipulated to by the parties and are

contained in the Affidavit of James McGuire, Vice President of Central National Bank of Cleveland, the ESOP's Trustee, ¶ 3-7, App. 118-120.

As ESOP Trustee, Central Bank received from CL in 1983 (prior to CL's purchase of Lee Way Motor Freight, Inc. ("Lee Way") stock certificates for 4,001,000 shares of CL common stock, which constituted 50.01% of CL's outstanding shares. Except for the nominal sum of $100 deposited in the ESOP Trust in connection with its establishment, the sole consideration for such shares consisted of $750,000 evidenced by five Trust notes of $150,000 each, serially maturing on the last day of February in the years 1984 through 1988.

Initially, all CL shares were pledged as security for the Trust notes. The provisions of the ESOP contemplate that annually CL will forgive the serial note

then maturing and that thereupon 800,000 shares of CL stock will be released from pledge and allocated to employees in accordance with the formula provided by the Plan, or that CL would make a cash contribution to the ESOP in the face amount of the note and Central Bank would then pay off the note by redelivering the funds to CL, thereby releasing the 800,000 shares of CL stock from the pledge.

On March 20, 1984, CL made a cash contribution to the ESOP in the amount of $149,900. On the same date, Central Bank delivered $150,000 to CL in payment of the 1984 note. In 1985, CL notified Central Bank that the 1985 note was forgiven, thereby releasing an additional 800,000 shares of CL stock for allocation among the employees in accordance with the formula provided by the Plan. To date, 1,600,000 shares have been released from pledge and

allocated under the terms of the Plan to employees, including those Lee Way employees participating in the Plan.

Pursuant to this arrangement, the only Trust asset (apart from the initial nominal deposit of $100) which Central Bank has held as Trustee has consisted of CL shares.

No payroll deductions or other cash payments (other than the cash contribution described above) have ever been transferred to the ESOP Trust.

No employee contributions have been made to the ESOP Trust, nor are any such contributions permitted under the terms of Section 4 of the CL Employee Stock Ownership Plan. The CL Plan has been entirely funded by the employer, as set forth above.

CL's management presented the wage reduction plan, including the ESOP, to Lee Way employees. They informed Lee Way employees that (1) Lee Way had suffered major

operating losses and needed to decrease expenses to continue operating; (2) the employees needed to agree to wage reductions to save the company; (3) the reductions in wages would help reduce Lee Way's expenses; and (4) without overwhelming employee participation in the program, Lee Way would probably fail.

Respondents participated in the compensation program. After Lee Way failed, however, respondents filed suit alleging that their interests in the ESOP were investment contracts and that the petitioners had violated securities laws in soliciting respondents' participation in the wage reduction program. Respondents seek more than six million dollars they allege as lost wages resulting from their participation in the wage reduction program, but they do not seek to recover benefits from

the ESOP or otherwise to enforce their rights as ESOP participants.

Following discovery and pretrial proceedings, the case was segmented for trial so that the Trial Court could resolve the disputed issue of whether interests in the wage reduction program constituted a security within the meaning of the Securities Acts.

After trial, the Trial Court ruled that the wage reduction program was neither contributory nor voluntary. Therefore, the Trial Court determined that the respondents' interests in the ESOP were not securities within the meaning of the Securities Acts.

On Appeal, the Tenth Circuit made four holdings relevant to the present appeal. First, it determined that the appropriate standard of review was de novo. Individual

Petitioners' Brief, App. 24. In doing so, it said:

> On the mixed question of whether the facts satisfy the proper legal standards, we conduct a de novo review if the question primarily involves the consideration of legal principals. . . .

Id. citing *Love Box Co. v. Commissioner*, 824 F.2d 1213, 1215 (10th Cir.), cert. denied, 488 U.S. 820 (1988). The Tenth Circuit, under de novo standard, rejected the Trial Courts' conclusions that the wage reduction program was involuntary and contributory, finding it to be both voluntary and contributory as those terms are used in connection with employee benefit plans.

Based upon these conclusions, the Tenth Circuit held that the wage reduction plan was an investment contract, and therefore, a security. Finally, it held that the Employees Retirement Income Security Act of 1974 ("ERISA") did not pre-empt

application of the Securities Act to the wage reduction plan.

SUMMARY OF ARGUMENT

It is clear from reading petitions for certiorari filed by both Pepsico and the individual petitioners that they have not followed the procedure outlined in Rule 10 of this Court for obtaining such writ. In essence, they are treating the petition as one for appeal as a matter of right rather than one for certiorari. As a result, rather than outlining, in detail, the reasons why this Court should grant certiorari under the criteria set out in Rule 10, the petitioners spend most of their petition re-arguing the merits of the case, attempting to show why the Tenth Circuit decision was wrong.

Even their discussion of the merits adds little. They offer no arguments not

already made nor authorities not already cited. The Tenth Circuit, in its lengthy and excellently reasoned opinion, carefully reviewed and distinguished each case now cited and discussed and rejected each argument now tendered. The Petitioners real reason for filing their petitions is that they simply disagree with the Tenth Circuit's decision, and they want this Court to give them the opportunity to appeal further[1]. Such is not the function of the certiorari process as the Respondents understand it.

This point is illustrated by the fact that the petitioners' issues on which they

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[1]The Respondents submit that the Tenth Circuit's analysis of both the law and facts was correct. As will be seen below, the decision of the Tenth Circuit is consistent with the decisions of this Court and the other courts of appeal. It is also consistent with the SEC interpretative position since 1940 as well as with the legislative history of the original securities acts and its amendments.

seek certiorari and a substantial portion of their briefs are devoted to attacking three critical holdings of the Tenth Circuit: (1) That the wage reduction plan was voluntary; (2) that it was contributory; and (3) that the Lee Way employees were not motivated solely to save their jobs, but had the requisite investment motive, at least in part. The trial court found these three points in the petitioners' favor, and they obviously agree with the trial court over the decision of the Tenth Circuit.

However, what they either do not understand, or chose to ignore, is the standard of review applied by the Tenth Circuit in the present case. The question of whether something is an investment contract, and therefore a security, under the test this Court developed in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 296 (1946), is a

mixed question of law and fact. See e.g., *Roe v. United States*, 286 F.2d 435 (5th 1961). See generally, 12A J. Long, Blue Sky Law § 8.02[1][b] (1991). It requires the application of facts to a legal standard. In such case, the Tenth Circuit stated: "On mixed question of whether the facts satisfy the proper legal standard, we conduct a de novo review if the question primarily involves the consideration of legal principles...." Individual Petitioners' Brief, App. 24, citing *Love Box Co. v. Commissioner*, 842 F.2d 1213, 1215 (10th Cir.), cert. denied, 488 U.S. 820 (1988). As a result, the conclusions of the trial court, at this point, are irrelevant because they have been replaced by the Tenth Circuit in its conduct of a de novo review of the issues. Nowhere, however, in their issues upon which certiorari is sought or in their briefs, do the peti-

tioners challenge, or even discuss, the legal propriety of the Tenth Circuit's application of the de novo standard of review.

Failure to challenge the legal standard of review or provide adequate reasons for review under the criteria outlined in Rule 10 of this Court should, in and of itself, be sufficient reason to deny the writ without further ado. However, since, admittedly, both petitions, at least, paid lip service to Rule 10, the Respondents feel compelled to respond to the Petitioner's claims.

As the Respondent perceives them, the petitioners have made three claims under Rule 10. The first two grounds appear to lie under Rules 10(a) and (c) in that the petitioner's claim that the decision of the Tenth Circuit is in conflict with a controlling decision of this Court in

International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helper of America v. Daniel, 439 U.S. 551 (1979) and the decisions of Seventh and Ninth Circuits in *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982); *Black v. Payne*, 591 F.2d 83 (9th Cir. 1979). The third claim raised, only by Petitioner Pepsico, appears to lie under that portion of Rule 10(c) indicating that certiorari is appropriate in those cases where a court of appeals "has decided an important question of federal law which has not been, but should be, settled by this Court...."

As to the first two of these claims, there simply is no conflict. The *Daniel* case held that compulsory non-contributory benefit plans were not investment contracts because the employee made no investment. Similarly, the Ninth Circuit in *Black* held that a voluntary non-contributory plan was

not an investment contract because there was no investment. On the other hand, the Tenth Circuit in the present case found the wage reduction plan to be both voluntary and contributory. In doing so, it held that the employees made an investment because they had to make individual decisions whether to join the plan and had to surrender the legal right to receive 17.35 per cent of the wages due them under their union contract.

Similarly, there is no conflict with the *Coward* case because again the instruments involved are different, and this difference mandates a different treatment under the *Howey* test. The *Coward* case involved a voluntary contributory defined benefit plan. The present case involves an Employee Stock Ownership Plan or ESOP which all acknowledge is a defined contribution plan. *Coward* held that the defined benefit

plan did not involve an investment contract because the employee incurred no investment risk, but was entitled to a fixed benefit. The Tenth Circuit, on the other hand, held that in the case of the defined contribution plan the employee bears the investment risk because the amount of his return under the plan is dependent upon the investment experience of the plan over which he has no control.

A similar analysis shows that there is not a true conflict in the last of the petitioners' alleged conflicts. *Daniel* held that investment contract status should not be extended to compulsory non-contributory plans because such plans had not been previously covered by the securities acts and were regulated by the Employee Retirement Income Security Act of 1974 ("ERISA"). The petitioners argue that *Daniels* held that because of the ERISA coverage there

was no need to cover any plans under the securities act.

To the contrary, the Tenth Circuit distinguished *Daniel* on two bases. First, it held that the *Daniel* test had been refined by this Court's subsequent decisions in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), and *Marine Bank v. Weaver*, 455 U.S. 551 (1982), so that the question was now whether the alternative regulatory system provided an adequate substitute for regulation under the securities act. It concluded that ERISA did not for two reasons. First, ERISA does not provide for disclosure prior to the investment decision. Second, ERISA arguably, does not provide these plaintiffs an adequate remedy for the violations alleged. The Tenth Circuit also held that voluntary contributory plans had always been considered securities by both Congress and the SEC, a

fact acknowledged by this Court in *Daniel*. Therefore, this Court's holding in *Daniel* was limited to compulsory non-contributory plans whereas the plan in the present case was a voluntary contributory defined contribution plan. Respondents believe the Tenth Circuit is correct on both points.

The last claim for the granting of certiorari under Rule 10(c)--that this is a major case involving an important issue of federal law which should be decided by this Court--also does not bear up under close inspection. The opinion below is not only lengthy, but also extremely well-reasoned, citing copious authority to support its conclusions. The decision carefully reviews all the cases presently cited by the Petitioners and discusses all the arguments they raise before this Court. Its conclusions are consistent with the precedent of this Court and the other cases dealing

with similar issues. As a result, there is no indication that it will not be followed by other courts. In summary, it correctly and persuasively establishes the law in this area. Under such circumstances, further review by this Court is not necessary in light of the restricted number of cases which this Court can review under Writ of Certiorari.

Finally, of course, the Respondents would urge the Court not to grant certiorari in the present case because the decision of the Tenth Circuit is correct on the merits. The wage reduction plan does constitute an investment contract under the *Howey* test. There was an investment. The employees had to surrender, individually, their legal right to receive additional wages under the union contract. Individual Petitioners' Brief, App. 45. There has never been a dispute that the necessary

common enterprise is supplied by the CL ESOP. *Id.* at 40. The Tenth Circuit, contrary to the trial court, concluded that the employees were motivated, at least in part, to make their investment by an expectation of a profit. *Id.* at 38. This conclusion is controlling as a result of the de novo review standard applied even though it may conflict with the conclusion of the trial court. Finally, the Tenth Circuit held that the profit was to come primarily from the efforts of the CL management and other employees. *Id.* at 41-42.

For the above stated reasons, the Respondents would urge the Court to refuse a Writ of Certiorari in the present case.

ARGUMENT

The petitioners appear to have made three claims under Rule 10 for the granting of Certiorari in the present case. Each of these claims will be examined in detail below.

I. THE DECISION IN *DANIEL*, *BLACK*, AND *COWARD* ARE NOT IN CONFLICT WITH THE TENTH CIRCUITS' DECISION IN THE PRESENT CASE

Turning to the claims under Rules 10(a) and (c), the petitioners first claim that the Tenth Circuit's decision that the wage reduction plan in the present case is an investment contract under the test formulated by the Court in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 296 (1946)[2],

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[2]In *Howey*, the Court said:

> [A]n investment contract for the purposes of the Securities Act means a contract, transaction, or scheme whereby a person invests his money in a common enterprise

conflicts with the holding of this Court in *International Brotherhood of Teamsters, Chauffeurs, and Warehousemen and Helper of America v. Daniel*, 439 U.S. 551 (1979) and of Seventh and Ninth Circuits in *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982); *Black v. Payne*, 591 F.2d 83 (9th Cir. 1979). In these cases, the courts held certain benefit plans not to be investment contracts. The Tenth Circuit reviewed all three cases and held that there was no conflict between its decision in the present case and these decisions. Its reasoning was that the types of plans involved in the earlier cases differed materially from that in the case at bar and that the differences required a different conclusion under the *Howey* test. While the

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and is lead to expect profits solely from the efforts of the promoter or a third party.

petitioners claim two points of conflict, the Respondents submit that the Tenth Circuit's analysis is correct and there is no conflict.

A. THE DECISIONS IN *DANIEL* AND *BLACK* THAT THE PLANS INVOLVED WERE NOT INVESTMENT CONTRACTS ARE NOT IN CONFLICT WITH THE TENTH CIRCUIT'S DECISION THAT THE PLAN IN THE PRESENT CASE WAS AN INVESTMENT CONTRACT

There is no conflict between the present case and the earlier decisions in *Daniel* and *Black*. These cases involve different types of benefit plans. The different characteristics of the plans in *Daniel* and *Black*, properly lead the Tenth Circuit to distinguish them from the wage reduction plan in the present case.

It is true that in *Daniel*, this Court held that certain benefit plans were not investment contracts and, therefore not securities covered by the securities acts.

However, the Court was careful to limit its holding to cover only compulsory, non-contributory plans. 439 U.S. at 553, 569-570. The Ninth Circuit in the *Black* case held that a compulsory, contributory plan not to be an investment contract.

The reasoning in both cases was that the first element of the *Howey* test for investment contracts-an investment or money or other consideration--was not met. To the contrary, the Tenth Circuit found in the case at bar that the plan was both voluntary and contributory.[3] It, then,

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[3]The Tenth Circuit felt that the plan was voluntary because each Lee Way union employee had to agree individually to accept the wage reduction plan, and their decision did not affect their continued employment under the existing union contract. Thus, each employee had to make an individual decision to invest. Second, the Tenth Circuit held that the wage reduction constituted a contribution to the plan and was the investment of consideration. This is consistent with the Court's holding in *Daniel*. See 439 U.S. at 560, n.12. See also *Yoder v.*

concluded that since each Lee Way employee had to make an individual decision to participate in the plan and surrender his right to a portion of the wages he was entitled to under the union contract that the first element of *Howey* had been satisfied. Thus, the plans in *Daniel* and *Black* differed materially from that in the case a bar and the difference required a different result under the *Howey* test.

B. THE DECISION OF THE TENTH CIRCUIT IN THE PRESENT CASE DOES NOT CONFLICT WITH THAT OF THE SEVENTH CIRCUIT IN *COWARD V. COLGATE-PALMOLIVE COMPANY*

There is no conflict between decision of the Tenth Circuit in the case below and

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Orthomolecular Nutrition, Inc., 751 F.2d 555, 560-561 (2d Cir. 1985); *Collins v. Rukin*, 342 F. Supp. 1282 (D. Mass. 1972). As will be seen below, the Respondents submit that the Tenth Circuit's holding that the plan was both voluntary and contributory is correct.

the holding in *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), cert. denied, 460 U.S. 1070 (1983). *Coward* held that certain employee benefit plans were not investment contract under *Howey*. The *Coward* case, however, requires a different analysis than undertaken in the last section. It is well recognized that there are two types of employee benefit plans: (1) defined benefit plans and defined contribution plans.

The SEC defined the two types of benefit plans in Employee Benefit Plans, SEC Securities Act Rel. No. 33-6188, 17 C.F.R. § 231.6281 (Feb. 1, 1980), reprinted in 1 Fed. Sec. L. Rep. (CCH) ¶ 1051. It stated that:

> A defined benefit plan pays fixed or determinable benefits. The benefits ordinarily are described in a formula which specifies the amount payable in monthly or annual installments to participants who retire at a certain age.

[notes omitted], quoted with approval in *Cunha v. Ward Foods, Inc.*, 545 F. Supp. 94, 99, n.5 (D. Haw. 1982), aff'd in part, rev'd in part on other grounds, 804 F.2d 1418 (9th Cir. 1983). It then described a defined contribution plan in this way:

> A defined contribution plan does not pay any fixed or determinable benefits. Instead, benefits will vary, depending on the amount of plan contributions, the investment success of the plan, and allocations made of benefits forfeited by non-vested participants who terminate employment. Thus, the amount of benefits is based, in part, on the earnings generated by the plan.

Id. [Notes omitted.] The SEC then went on to identify Employee Stock Ownership Plans or ESOPs as being one example of a defined contribution plan. *Id.*, n. 30. The petitioners have never disputed this fact.

The significant difference in the plans lies in who must bear the investment risk. Under the defined benefit plan the

employee is entitled to a fixed payment. If the investment experience of the fund does not generate sufficient income to pay this benefit, then the employer must make additional contributions. On the other hand, in the case of the defined contribution plan, the amount of the benefit received is controlled at least in part by the investment success of the fund. Therefore, the employee, not the employer, bears the investment risk. See ESOPs, Just Part of Growth in Employee Ownership, Authors Find, Daily Labor Report (BNA), No. 163, at A-2 (Aug. 22, 1991)(Avail. on LEXIS).

In *Coward*, while the plan was both voluntary and contributory,[4] it was also a defined benefit plan. Because under such plan the employee bore none of the invest-

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[4]Therefore, the *Coward* plan would have been an investment contract under the analysis in the last section.

ment risk, the Seventh Circuit concluded that the fourth element of the *Howey* test--that the profits come from the efforts of others--was not met[5].

After correctly identifying the plan in the present case as a defined contribution plan, the Tenth Circuit concluded, because the employee under such plan must bear the investment risk, the "efforts of others" portion of the *Howey* test had been met. The Tenth Circuit said:

> [This requirement is] met in this case because any profit on plaintiffs' ESOP interest would occur through dividend distributions and appreciation in the value of the stock allocated to their accounts, which in both cases

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[5]This rationale was accepted in two other cases cited by the petitioners. *Cunha v. Ward Foods, Inc.*, 545 F. Supp. 94, 99-100 (D. Haw. 1982), aff'd in part, rev'd in part on other grounds, 804 F.2d 1418 (9th Cir. 1986); *Tanuggi v. Grolier, Inc.*, 471 F. Supp. 1209 (S.D.N.Y. 1979). These cases have no application to the present case involving a defined contribution plan.

> would result primarily from the efforts of CL's managers and its employees.

Individual Petitioners' Brief, App. 41-42, quoting with approval, *Harris v. Republic Airlines Inc.*, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,772 at 98,624 (D.D.C. 1988)(Sporkin, J.). This conclusion is consistent with this Court's holdings in *SEC v. United Benefit Life Ins. Co.*, 387 U.S.202 (1967); and *SEC v. Variable Annuity Life Ins. Co. of America*, 359 U.S. 65 (1959).

Again, the difference between the plans mandates a different result under *Howey*. The present case and *Coward* are distinguishable and not in conflict.[6]

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[6] See generally, 5 H. Bluementhal, Securities & Federal Corporate Law § 2.07[5][a] at 2-73 (1991).

II. THE TENTH CIRCUIT'S DECISION THAT ERISA DOES NOT PRE-EMPT COVERAGE UNDER THE SECURITIES ACT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *DANIEL*

The second alleged conflict the petitioners believe entitle them to certiorari under Rule 10(c) is a purported conflict between the ruling in the present case that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. does not pre-empt the application of the securities acts and this Court's holding in *Daniel*. The petitioners argue, based upon *Daniel*, even if the wage reduction plan in the present case can qualify as an investment contract under the *Howey* test that all such plans are no longer to be treated as securities because of their coverage under ERISA. It is true that this Court in *Daniel* gave as one of its reasons why the plan in that case should not be covered by the se-

curities acts was the fact that the plan was covered by ERISA. 439 U.S. at 569-570. The Tenth Circuit, however, correctly rejected the application of this holding to the present case for two reasons.

First, the Tenth Circuit correctly pointed out that the language of the Court in *Daniel* was limited to the compulsory non-contributory plan before it. Individual Petitioners' Brief, App. 76. This distinction is important because the Court in *Daniel* had already acknowledged that voluntary contributory plans had been considered securities for more than forty years. See 439 U.S. at 566-567.

Thus, the issue in *Daniel* was not the status of the voluntary contributory plans, but rather whether the investment contract concept should be extended to compulsory non-contributory plans previously thought not to be covered by the securities acts.

In that context, the application of ERISA is significant to determine Congressional intent and to determine the need to extend the protection of the securities acts to this new class of plans. The Tenth Circuit extensively considered each of these points and found no displacement of the securities acts under either point. Individual Petitioners' Brief, App. 52-79. Again, the Respondents submit the analysis of the Tenth Circuit is entirely correct and is not in conflict with either *Daniel* or the subsequent holdings in *Reves v. Ernst & Young*, 494 U.S. 56 (1990), and *Marine Bank v. Weaver*, 455 U.S. 551 (1982).

Turning first to the need for protection issue, the Tenth Circuit held that the test developed in *Daniel* has been further refined in *Reeves* and *Marine Bank*. The Tenth Circuit held that the current test is whether or not "such alternate federal re-

gulation accomplishes the same purposes as the securities laws, thereby making the securities laws' protection for investors duplicative and unnecessary." Individual Petitioner' Brief, App. 55, citing *Holloway v. Peat, Marwick, Mitchell & Co.*, 879 F.2d 772, 778 (10th Cir. 1989).

Applying this standard, the Tenth Circuit held that ERISA does not provide the same type of comprehensive disclosure and remedial protection contemplated by the securities act. *Id.* at App. 57-72. ERISA does not mandate pre-investment disclosure, and the disclosure required is directed toward employee's rights under the plan rather than "distributing information regarding the plan's financing or its financial soundness" *Id.* at 60. There is clear evidence that Congress was concerned with the need for such pre-investment disclosure in connection with employee benefit plans.

H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 41 (1934), quoted in *Id.* at 50. ERISA also does not provide a right of rescission such as the Respondents are seeking in the present case. *Id.* at 66-72.

As to the issue of Congressional intent, coverage under ERISA would lend support to an inference that Congress agreed with the prevailing view, confirmed by *Daniel*, that compulsory non-contributory plans were not covered. Such an inference, however, may not be extended to cover voluntary contributory plans in the face of a showing of specific evidence of Congressional intent to cover such plans under the securities acts.

The Tenth Circuit found an abundance of such evidence in the legislative history of the securities acts, beginning soon after their passage and continuing after the passage of ERISA. *Id.* at 50-52. It

also pointed out, as did *Daniel*, that the SEC has asserted jurisdiction over such plans continuously since 1940 and continues to do so. *Id.* at 48 n.13. See also *Diagnostics, Inc.*, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,354 (SEC NAL Nov. 29, 1982); *Analog Devices, Inc.*, 1983 SEC No-Act. LEXIS 2022 (SEC NAL Mar. 15, 1983); *Clark Tank Lines*, 1984 SEC No. Act. LEXIS 2590 (SEC NAL Sept. 22, 1984). Further, the Tenth Circuit noted that, ERISA itself contains an expression of such intent in Section 1144(d). This section specifically provides that it was not Congressional intent in passing ERISA to "alter, amend, modify, invalidate, impair, or supersede" any existing federal statute. 29 U.S.C. § 1144(d).[7]

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[7]As the Tenth Circuit noted, this conclusion is further re-enforced by the specific exclusion from pre-emption of the state securities laws. See Individual

III. THE PRESENT CASE DOES NOT PRESENT AN ISSUE OF SUFFICIENT NATIONAL SIGNIFICANCE TO WARRANT A GRANT OF CERTIORARI

Petitioner Pepsico appears to argue that certiorari is appropriate under Rule 10(c) on the basis that the present case involves an important question of federal law which should be decided by this Court. It does so by pointing out that 10,000 companies utilize some form of employee stock ownership plan and that these companies employ more than 11.5 million Americans. Pepsico Brief, 3, citing Employee Ownership Plans Seem As Way to Protect Workers' Jobs, Daily Labor Report (BNA) No. 68, at A-4 (Apr. 9, 1991). The impression that Pepsico tries to convey is that the present case will have an adverse impact upon all these plans and employees.

Petitioners' Brief, App. 72-79.

A reading of the cited article, however, indicates that voluntary contributory plans such as the one in the case at bar make up only a very small portion of this total either in terms of plans or number of employees. Further, the article states most current wage reduction plans are union-sponsored.* As a result, the acceptance of the plan is by union vote rather than by individual decision. Therefore, the

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*This caused the courts in *Childers v. Northwest Airlines, Inc.*, 688 F. Supp. 1357 (D. Minn. 1988) and *Bauman v. Bish*, 571 F. Supp. 1054 (N.D.W.Va. 1983), both cited and relied upon by the petitioners, to hold that there was "no sale" of the interests in the wage reduction package. As noted by the Tenth Circuit, Individual Petitioners' Brief, App. 46 n.12, this collective union-vote distinguishes these cases from the present one where the employees had to make individual decisions on whether to join the plan. Further, there is substantial question as to the validity of these decisions in light of the abandonment of the "no sale" theory by the SEC in 1972. See generally, R. Jennings & H. Marsh, Securities Regulation 405-411 (6th ed. 1987).

impact of the present case, even if it provided major change in prior expectations in this area would not have a major impact.

The present case, however, does not make a major change in the expectations as to the coverage of voluntary contributory plans. While this Court has never ruled directly upon this issue, it acknowledged in *Daniel*, 439 U.S. 563-569, that SEC had asserted jurisdiction over voluntary contributory fixed contribution plans for about 40 years. The SEC, immediately following *Daniels*, reasserted its jurisdiction over these voluntary contributory plans. Employee Benefit Plans, Securities Act Rel. No. 33-6188, 1 Fed. Sec. L. Rep. (CCH) ¶ 1051 at 2073-8 to 2973-9 (Feb. 1, 1980); Employee Benefit Plans, Securities Act Rel. No. 33-6281, 1 Fed. Sec. L. Rep. ¶ 1052 at 2073-31 (Jan. 15, 1981). Further, as pointed out in the last Section, the

Tenth Circuit found there is substantial evidence, dating from soon after the passage of the Securities Act of 1933, that Congress intended such plans to be covered and specifically assented to the SEC's claim of jurisdiction. Individual Petitioners' Brief, App. 49-52,

Two final points should be noted. First, the only other cases to consider plans similar to the wage reduction plan in the present case have also concluded that the plans constituted investment contracts. *Hood v. Smith's Transfer Corp.*, 762 F. Supp. 1274 (W.D.Ky. 1991); *Harris v. Republic Airlines, Inc.*, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,772 (D.D.C. May 18, 1988) (Sporkin, J.). See also *Leonard v. Drug Fair Inc.*, [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,144 (D.D.C. 1979). Further, and probably more revealing, is the fact that

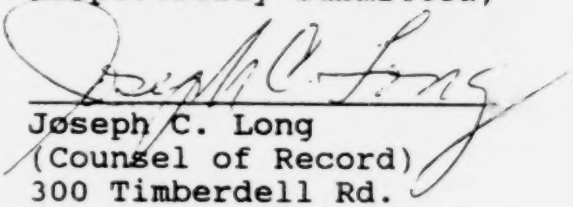
wage reduction programs similar to the one in the present case were quite common in the trucking industry in the mid-1980's. The records of the SEC reflect, however, that most were registered. See e.g, *Interstate Motor Freight System*, SEC Reg. No. 2-87143 (Nov. 7, 1983); *Transcon Incorporated*, SEC Reg. No. 2-85365 (Aug. 22, 1983); *Ryder/P-I-E Nationwide, Inc.*, SEC No. (Sept. 17, 1985). As a result, it is clear that the industry itself knew that the plans they were offering were securities. Only the present petitioners appear to be out-of-step.

In light of this substantial body of consistent authority agreeing with the conclusion of the Tenth Circuit, Respondents submit that the issues involved are not of sufficient national significance to occupy the limited and precious time of this Court.

CONCLUSION

For the above stated reasons, the Respondent respectfully urges this Court to deny the request by both groups of petitioners for a Writ of Certiorari.

Respectfully submitted,



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